Filed 6/9/09 In re J.S. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.S., et al., Persons Coming Under the Juvenile Court Law.	B210582
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. B.S., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK38754)

APPEAL from an order of the Superior Court of Los Angeles County. Valerie Skeba, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Jacklyn K. Louie, Deputy County Counsel, for Plaintiff and Respondent.

Father appeals from the August 20, 2008 order terminating his parental rights to his daughter (J.S.) and son (S.S.). He contends (1) he was denied due process and (2) a restraining order enjoining him from contact with the children was not supported by substantial evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Father and mother were married from 1988 until 1999 and had three children: daughter J.S. and sons C.S. and S.S. (collectively the children). In April 1998, father was convicted of inflicting corporal injury upon a spouse. He was incarcerated when the children were detained in 1999 by the Department of Children and Family Services (the department) as a result of general neglect and a Welfare and Institutions Code section 300 petition was sustained.[1] Juvenile court jurisdiction in that case was terminated in 2001.

In June 2007, father was incarcerated in Idaho when the children were detained again after J.S., then 13 years old, revealed to a camp counselor that her mother's boyfriend had been sexually molesting J.S. for several years. At the time, C.S. was 16 years old and S.S. was 11 years old. As eventually sustained, the petition alleged the children were dependent children under section 300, subdivisions (b) [mother's and father's failure to protect and provide adequate care, mother's substance abuse], (d) [mother's failure to protect J.S. from sexual abuse], and (j) [mother's failure to protect sibling]. Father was found to be the children's presumed father and the children were placed together with a husband and wife who were family friends (the caregivers).[2]

Father first learned that the children were detained when he called mother's home to wish S.S. a happy birthday in July 2007. Father called the children at their placement

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[1] All future undesignated statutory references are to the Welfare and Institutions Code.

[2] The caregiver-husband's father was the children's family pastor and the caregiver-wife was J.S.'s Sunday School teacher. C.S., who turned 18 in May 2009, was later moved to the home of other family friends and that couple was eventually appointed C.S.'s legal guardians. Father does not contest that order.

and made arrangements to meet them at a restaurant a few days later, when he was going to be in California on business. The dependency investigator attended that meeting and interviewed father, who vowed "to do whatever it takes" to regain custody of the children, including finding out about classes and programs in Idaho. Father gave the children a telephone number at which to reach him, but when the children later called that number, it was disconnected. The next day, the caregiver told the social worker that the visit had been awkward for the children because father spoke negatively of mother and said he was going to try to regain custody. The children told the caregiver that if they could not return to mother, they would rather stay with the caregiver than live with father.

In reports prepared for the jurisdictional hearing in July 2007, the department recommended that father receive reunification services. According to one report, father expressed a desire to see the children again before he returned to Idaho, but "none of the children were interested in visiting with their father." Father did not appear at the hearing, but was represented by appointed counsel. The children stated that they had not seen father in two years. Counsel for the children stated that the children were "not comfortable going back to the father, who has not really raised them. They have contact but they're – that's not what their wishes are." Although mother was prepared to submit on the petition, the matter was continued to give father's counsel an opportunity to discuss the matter with father. Meanwhile, the juvenile court ordered father to participate in individual and parenting counseling and to obtain appropriate housing; notwithstanding the children's expressed disinterest, the juvenile court ordered twice monthly monitored visits for father.

Father was represented by counsel but did not appear at the continued hearing on August 3, 2007, at which the juvenile court sustained the amended petition. Father was ordered to, among other things, participate in individual counseling and the department was given discretion to increase the twice monthly monitored visits.

Father did not appear at the continued hearing, but was represented by counsel, who indicated that she had been unable to reach father at the numbers he had provided. According to an Information For Court Officer form filed the day of the hearing, father

had not contacted the department within the last period of supervision. The children, meanwhile, were all thriving in their placements, and the caregivers were interested in a permanent placement plan of legal guardianship or adoption. The department recommended termination of parental rights, but because of notice problems, the hearing was continued. The juvenile court stated that it would stop reunification services if father did not appear at the next hearing.

Father did not appear at the continued hearing. The department had notified father (and mother) that the department was recommending termination of parental rights, but neither parent had contacted the children or the department. Father's counsel indicated that she had "nothing to add to the reports." The juvenile court terminated father's reunification services and set the matter for a section 366.26 permanent plan hearing (.26 hearing) on July 1, 2008.

Father made contact with the children again a month later, on April 5, 2008. He told the caregivers that he had lost touch because "he was in a bad place" mentally. Father started calling the children about twice a month. On June 5, 2008, father told the social worker that he did not want the children to be adopted because he wanted "a chance in the future to get his children back when he has gotten his life together." Meanwhile, the children were looking forward to being adopted by the caregivers. The caregivers told the social worker that they would allow the children to remain in contact with their biological parents (and older siblings), so long as the biological parents behaved appropriately and did not hurt the children.

By the time of the .26 hearing on July 1, 2008, father had moved from Idaho to northern California and he appeared at the hearing. He asked for weekly monitored visits. But counsel for the children sought to terminate father's visits altogether, explaining that father had been "so inappropriate" at the last visit "that the police had to be called."[3] Since that visit, the children had been staying in the caretaker's bedroom.

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[3] Father's counsel explained that the turmoil at the last visit was caused by father bringing his dog.

The children's counsel maintained that any further visits with father would be detrimental to the children. The juvenile court gave "the department discretion to allow one visit per week for the father for one hour in the department's office if the children are in agreement." Father's counsel objected "to giving the department discretion to allow the weekly visits." The juvenile court responded: "No. I didn't say the department had discretion. I ordered the weekly visits. I gave the children discretion." Father's counsel responded: "That's fine." The juvenile court also ordered father to have monitored telephone calls with the qualification that, "If the children want to get on the phone, that's great. If the current caretakers simply want to give the father information about how the kids are doing, and that's all the call, you know, consists of, that's fine too. But I have no problem with him calling. My concern, of course, is that the children at this time appear to not want to have that contact in a fairly serious way. I hope that they will at least talk to their dad over the phone. But, at this point, we're really at the end of the case so I'm hoping they will at least get on the phone and say hi." Regarding the children's visits with their older sibling, the juvenile court explained: "Given that this is the end of the case, I'm not going to start forcing something, one way or the other. If it turns out that I don't do the adoption, then it turns out that we'll take a look at it again." The matter was continued to August 20, 2008, for a contested .26 hearing.

On July 8, 2008, the children made an ex parte application for a restraining order against father. According to the application, after the .26 hearing a week earlier, father "made a threatening statement to the current caregivers . . . . [Father] specifically said to the caregivers: 'you haven't heard/seen the last of me.' [Father] has a history of violence, and at his last visit with his children he was almost arrested when the caregivers had to call the police for his abhorrent behavior. The petitioners are seeking a restraining order because they fear for their lives, especially since he knows where they live." The juvenile court issued a temporary restraining order (TRO) and set the matter for hearing. On July 23, 2008, the TRO was "extended to 8/20/08 by mutual agreement of the parties and the court."

Father requested a visit with the children the week of August 11, 2008, but the children told the social worker they were not ready to visit father. According to a Last Minute Information For The Court filed for a pretrial conference on August 13, 2008, in a telephone conversation S.S. told the social worker that he "[did] not really" want to maintain contact with father; J.S. did not want to be forced to remain in contact with her biological parents, but wanted discretion to do so.

At the contested .26 hearing on August 20, 2008, mother withdrew her objection to termination of her parental rights.[4] Both children testified in chambers.[5] Fourteen-year-old J.S. testified that she wanted to be adopted and did not want to live with either of her biological parents. She had seen father just a couple of times since she had been in placement. One visit was canceled after the police were called; another visit was monitored by someone from the department. There had been just one visit in 2008, but it did not go well. J.S. had a few telephone contacts with father in 2008, but did not enjoy them. At the time of the hearing, J.S. did not want to visit father. She explained that she wanted to be able to visit her biological parents sometime in the future, but "right now it's just not the time for me, but when I'm ready to see them than I would like to if I want to." J.S. understood that her adoptive parents would be able to decide whether or not she could see father. Asked whether she was "okay with that," J.S. testified, "Well, we talk it over so either way I'll be okay with it, but we talk it over if that makes any sense." Asked whether she was afraid of father, J.S. testified "I'm kind of with his background,

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4 Noting that the prospective adoptive parents were willing to allow the children to maintain appropriate contact with the biological parents, the juvenile court praised mother for her display of courage in putting the children's needs over her own.

5 See section 366.26, subdivision (h)(3)(A) ["The testimony of the child may be taken in chambers and outside the presence of the child's parent or parents, if the child's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exists: [¶] (i) The court determines that testimony in chambers is necessary to ensure truthful testimony. [¶] (ii) The child is likely to be intimidated by a formal courtroom setting. [¶] (iii) The child is afraid to testify in front of his or her parent or parents."].

with his history. Just sometimes it gets kind of scary when he gets mad. I don't know what he's going to do so kind of."

Thirteen-year-old S.S. testified that he understood that adoption means to have new parents and that if he did not want to be adopted, he did not have to be; S.S. wanted to be adopted. It did not matter to him that father did not want him to be adopted. S.S. would want to live with mother if she was not an alcoholic and with father if father "was still with my mother and if he didn't have a violent temper." S.S. was "kind of" afraid of father's violent temper, although he had never personally experienced it and only heard about it from mother and the caregivers. S.S. had one monitored visit with father in 2008, which lasted less than half an hour; S.S. did not enjoy that visit because during most of it father and J.S. argued. S.S. wanted to be able to visit father when he was ready but it was not particularly important to him to be able to do so because, S.S. explained, father had not been there for S.S.'s "whole life and we've only seen him a few times." S.S. understood that his adoptive parents would decide whether or not he saw his biological parents and he was "okay" with that.

Father testified that he objected to adoption because he "had problems just trying to visit with the kids or even [speak] with them on the phone." Father saw the children once in 2007, but the children did not seem to enjoy the visit. In March 2008, father moved from Idaho to Sacramento. Over the past year, father visited J.S. twice; once at a restaurant with the family and once at the department's office. The first visit went well, but the second did not because the children acted as if they were "scared to death" of father. Father was not aware that J.S. was afraid of him; he had never acted violently toward her or in any way that would cause her to be afraid of him. Father attempted to schedule two or three other visits with the children through the caregivers and the department but at one visit, the police were called and father did not know why the other visits never occurred. Earlier that year, father had been in weekly telephone contact with the children but then the phone calls ended and father did not know why. When he tried calling, no one answered the phone. Father hoped that the children would benefit from continued visitation with him.

Based on this evidence, father's counsel argued that father's parental rights should not be terminated because to do so would be detrimental to the children within the meaning of the section 366.26, subdivision (c)(1)(B)(i) exception to the preference for adoption when the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The juvenile court found by clear and convincing evidence that the children were adoptable and that the exception did not apply. Accordingly, it terminated father's parental rights.

Immediately following the contested .26 hearing, the juvenile court heard evidence in the proceedings for a permanent restraining order. Father admitted that after the July 1, 2008, hearing he told the caregivers, "You haven't heard or seen the last of me." By this, father meant he would see them again in future court proceedings related to his continued efforts to see the children; father was not threatening them with physical or emotional violence. Father had never directed any physical violence at the children or the caregivers and had never threatened them with physical violence. A few days after the hearing, father brought his 180-pound dog, which he described as "part-Boxer," to the church where a scheduled monitored visit was to occur. When father arrived, the children were inside the church and the caregivers met father outside. Father testified that he refused the caregivers' request that he lock his dog in the car because it was too hot to leave the dog in the car. A verbal dispute ensued. When the police arrived, father explained the situation to them. Father eventually locked the dog in the car with the windows rolled down, but when he returned to the church and knocked on the door, no one answered. Father did not see the children that day. He did not mean to harm either of the caregivers. Father's counsel argued that no restraining order should issue because there was not sufficient evidence to find, by a preponderance of the evidence, that the conduct described in the request for a restraining order had, in fact, occurred.[6] The

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[6] Father's counsel urged the juvenile court to not consider the children's testimony in the .26 hearing as evidence in the restraining order proceedings. The juvenile court stated that it was considering the children's testimony. Father does not challenge this ruling on appeal.

juvenile court issued the restraining order, explaining that "both the [caregivers] and the children have some fear of the father. However, this is an extremely volatile time and [father] is understandably more upset now than he may be down the road although I am not sure. [¶] . . . I am issuing the restraining order for six months and six months only. At that point by February 18th, 2009, we will know whether or not [father] poses any kind of risk at all and at that point we will be well along in the adoptive process. If [father] continues to remain away from [the caregivers] and away from the children, then this will automatically lift six months from now. [¶] I do believe a three-year restraining order under the facts of this is excessive and I am not going to do it . . . [T]he only exception to the restraining order would be if the children wish to see their father and [the caregivers] are willing to arrange that."

Father filed a timely notice of appeal from the order terminating his parental rights and the issuance of a restraining order.

DISCUSSION

1. *The Termination of Father's Parental Rights*

Father contends he was denied due process. As we understand his argument, it is that the juvenile court improperly gave the children the power to decide whether to visit father, thus thwarting any chance father had to reunify with them. Father argues that given the error in the visitation order, the .26 hearing that followed was "a travesty." We find no error in the visitation order, and affirm the termination of parental rights.

After reunification services are terminated, the juvenile court must permit the parents to continue visiting the child unless the court finds it would be detrimental to the child. (§ 366.21, subd. (h); *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504 (*Hunter S.*).) The power to decide whether any visitation shall occur lies exclusively with the juvenile court. (*In re S.H.* (2003) 111 Cal.App.4th 310, 317.) As with all proceedings under section 366.26, it must take the wishes of the child into account and must act in the best interests of the child. (§ 366.26, subd. (h)(1); *In re Joshua G.* (2005)

129 Cal.App.4th 189, 201.) But, "[i]n no case may a child be allowed to control whether visitation occurs." (*Hunter S., supra*, at p. 1505; *In re Julie M.* (1999) 69 Cal.App.4th 41, 48-49 (*Julie M.*); *In re Danielle W.* (1989) 207 Cal.App.3d 1227 (*Danielle W.*).) Thus, a child's aversion to visiting a parent may not be the sole factor in deciding whether visitation is to occur; but it may be a dominant factor in making the decision. (*Julie M., supra*, at p. 49.)

In the leading case on the issue, *Danielle W.*, two sisters were declared dependent children after they were sexually molested by their step-father. At the conclusion of the disposition hearing, the juvenile court ordered: " 'Visitation will be at [the department's] discretion and the children's discretion. [¶] I am not going to force them to visit when they don't want to. But whenever they want to, it can be at a location selected by the [the department], which should be designed to accommodate both the mother and the children.' " (*Danielle W., supra*, 207 Cal.App.3d at p. 1233.) On appeal, the mother challenged the order as an unconstitutional delegation of judicial power and contended she was denied due process because the order established no means to review the decisions of the department and the minors as to visitation. (*Id*. at pp. 1233, 1237.) The appellate court affirmed, reasoning that the order did "not represent an improper delegation of judicial power. First, there is no delegation of judicial power to the children even though the order states in part that visitation will be at the discretion of the minors. In the context of this case, this means the children should not be forced to visit with their mother against their will and in no way suggests that the minors are authorized to do more than express their desires in this regard. . . . [T]he order simply authorizes the Department to administer the details of visitation, as specified by the court. Although the order grants the Department some discretion to determine whether a specific proposed visit would be in the best interests of the child, the dominant factor in the exercise of that discretion is the desire of the child to visit the mother." (*Id*. at p. 1237.) The order did not deny mother due process because it was limited and subject to periodic review by the court, including by way of a section 388 petition. (*Id*. at p. 1238.)

The challenged order in this case is similar to the one at issue in *Danielle W.* In the context of this case, as in *Danielle W.*, the order reflected the juvenile court's decision that the children should not be forced to visit with father against their will and "in no way suggests that the minors are authorized to do more than express their desires in this regard." (*Danielle W., supra*, 207 Cal.App.3d at p. 1237.) The order did not deprive father of due process because, as in *Danielle W.*, it was subject to periodic review, including by a section 388 petition.

Because father's only claimed error in the termination of parental rights is based on the visitation order, which we have found proper, the order terminating parental rights is affirmed.

2. *The Restraining Order*

Father next contends that the juvenile court erred in granting the restraining order. He argues that the order was not supported by sufficient evidence that he committed an assault or threatened to do so, or that physical or emotional harm would result absent the order. The department counters that evidence of father's prior conviction for domestic violence, the threat he made to the caretakers after a hearing, the scene he made when he brought his dog to a subsequent visit and the children's expressed fear of him was sufficient. In a separate motion, the department asks that we dismiss this portion of the appeal because it is moot inasmuch as the restraining order was not reissued on February 18, 2009. We deny respondent's motion to dismiss and affirm the order.

a. The motion to dismiss

The department moves to dismiss father's challenge to the restraining order on the grounds that the issue is moot because the restraining order was not renewed.[7] Father

[7] In support of the motion to dismiss, the department requests that, pursuant to Code of Civil Procedure section 909 and California Rules of Court, rule 8.252, we take judicial notice of a February 18, 2009, minute order, which reflects that the restraining order was not renewed. Father argues that judicial notice is improper under Code of Civil Procedure section 909, but concedes that it is proper under the Evidence Code 452. We take judicial notice of the minute order.

argues that the propriety of the restraining order is not moot because it could have consequences for father in future court proceedings and is a blot on father's record. (*Cassandra B.* (2004) 125 Cal.App.4th, 199, 209-210 [expiration of restraining order does not render appeal from that order moot inasmuch as issuance of the order could have consequences for mother in future court proceedings].) Father is correct. Accordingly, we deny the motion to dismiss.

***b. Substantial evidence supported the issuance of the restraining order*[8]**

The issuance of a restraining order may not be disturbed if it is supported by substantial evidence. In reviewing a challenge to the sufficiency of the evidence to support the order, we view the evidence in the light most favorable to the respondent, indulging all legitimate and reasonable inferences to uphold the order. (*Cassandra B., supra,* 125 Cal.App.4th at pp. 210-211.)

Pursuant to section 213.5, subdivision (a) (§ 213.5(a)), the juvenile court may issue a temporary restraining order protecting a dependent child and any caregivers of the child.[9] Violent behavior or the threat of violence by the enjoined person is not a prerequisite to the imposition of a restraining order under section 213.5(a). (*Cassandra B., supra,* 125 Cal.App.4th at pp. 211-212.) The court in *Cassandra B.* explained that

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[8] Some courts have applied the abuse of discretion standard of review. (See, e.g., *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1512.) The practical differences between the two standards are not significant (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351), and under either standard, we would affirm the juvenile court's order.

[9] In part, section 213.5, subdivision (a) provides: "the juvenile court may issue ex parte orders (1) enjoining any person from molesting, attacking, striking, sexually assaulting, stalking, or battering the child or any other child in the household; (2) excluding any person from the dwelling of the person who has care, custody, and control of the child; and (3) enjoining any person from behavior, including contacting, threatening, or disturbing the peace of the child, that the court determines is necessary to effectuate orders under paragraph (1) or (2). A court may also issue an ex parte order enjoining any person from contacting, threatening, molesting, attacking, striking, sexually assaulting, stalking, battering, or disturbing the peace of any parent, legal guardian, or current caretaker of the child, regardless of whether the child resides with that parent, legal guardian, or current caretaker . . . ."

this is because, in the context of section 213.5(a), the term "molest" is synonymous with "conduct designed to disturb, irritate, offend, injure, or at least tend to injure another person. [Citations.]" (*Id*. at p. 212.) In that case, evidence that the enjoined parent was trying to gain entry to the home of the child's caregivers without their knowledge, appearing at the child's school and then following behind the caregiver's car after the child was picked up from school, together with threats to remove the child from her caregivers' home, was held sufficient to support issuance of the restraining order because it constituted "molestation" within the meaning of the statute. (*Id*. at pp. 212-213.)

Here, the juvenile court could reasonably have interpreted father's comment " 'you haven't heard/seen the last of me,' " as a threat of physical or emotional harm, particularly in light of father's history of violence. This comment, combined with the verbal altercation that developed when father appeared at a subsequent visit with a dog that he refused to restrain elsewhere for the duration of the visit, constitutes substantial evidence of "molestation" within the *Cassandra B.* definition.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.